

NO. 48392-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN K. MALONEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin

No. 15-2-11629-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is a petition to restore firearm rights brought under RCW 9.41.040(4), found in "Crimes and Punishments," a criminal proceeding not subject to the awards for costs and fees that may be recovered under RCW 4.84 in a civil proceeding?
2. Does an order restoring the firearm rights of a convicted felon, granted on an uncontested petition, make the petitioner into a "prevailing party" for the purposes of RCW 4.84.010?
3. Is an order restoring the firearm rights of a convicted felon a "judgment" as contemplated by RCW 4.84.010?
4. If RCW 4.84 is applicable to an order restoring firearm rights issued under RCW 9.41.040(4), may the issuing judge exercise discretion to deny costs as justice requires, pursuant to RCW 4.84.190?

B. STATEMENT OF THE CASE.

1. Procedural History

On August 27, 2015, Appellant filed a firearm rights restoration petition with Pierce County Superior Court, brought pursuant to RCW 9.41.040(4). CP at 1, 33. Pierce County appeared in the case on September 2, 2015. CP at 3-4. After determining that Appellant was statutorily eligible for restoration of his firearm rights, the County prepared a stipulated for presentation to the Court. CP at 20. The Court accepted the order ex-parte and signed it on September 29, 2015. CP at 20-21, 35.

After the order granting the petition was entered, Appellant filed a

motion seeking costs on October 8, 2015. CP at 7. The County filed a brief opposing the motion on November 2, 2015. CP at 11. The Court heard the motion on November 20, 2015. CP at 35. At the hearing, the Court entered an order denying the motion for the reasons stated in the County's brief. CP at 30. On December 29, 2015 the Court entered detailed findings of fact and conclusions of law in support of its order. CP at 33. Appellant timely appealed the order and filed a notice of appeal on December 18, 2015. CP at 32.

2. Facts

In 1980, Appellant was convicted of burglary in the second degree, CP at 6, 33. In 1983, he was again convicted of attempting to elude police. *Id.* Pursuant to RCW 9.41.040(1)(a), his convictions for these crimes resulted in the forfeiture of his firearm rights. CP at 33. Burglary in the second degree constitutes a "serious offense" under RCW 9.41.040(1)(a). *See* RCW 9.41.010(3)(a), (21)(a).

In 2015, Appellant filed a firearm rights restoration petition with Pierce County Superior Court, brought pursuant to RCW 9.41.040(4). CP at 33. Although the case was assigned a civil case number and initially assigned to a civil judge, it was ultimately transferred to the presiding judge of the criminal division. CP at 34. Pierce County appeared in the case on September 2, 2015 to assist the Court and Appellant in obtaining a criminal

background check on Appellant and offering a recommendation on his qualification for a restoration order. CP at 3-4. There is no statutory duty imposed on the County to participate in these proceedings. CP at 20. The County's role is solely to assist the Court in determining if a petitioner is statutorily eligible to receive a restoration order. *Id.* At no time has the State of Washington appeared in the matter.

After reviewing Appellant's petition and criminal history, the County determined that Appellant had satisfied the requirements for restoration of his firearm rights. CP at 20. The County then prepared an order to that effect for presentation to the Court, which the Court accepted ex-parte, without a hearing, and signed on September 29, 2015. CP at 20-21, 35. At no time was Appellant's petition opposed by the County or the State. CP at 21.

After the order granting the petition was entered, Appellant filed a motion seeking costs. CP at 7. The County filed a brief opposing the motion, CP at 11, and the Court heard the motion on November 20, 2015. CP at 35. Ultimately, the Court entered an order denying the motion for the reasons stated in the County's brief, CP at 30, and on December 29, 2015 the entered detailed findings of fact and conclusions of law in support of its order. CP at 33. Specifically, the Court determined that:

1. The restoration process stated in RCW 9.41.040 arises from

the application of a criminal statute, and therefore the RCWs and court rules that award costs to prevailing party in civil cases do not apply.

2. Petitioner is not a "prevailing party," as contemplated by RCW 4.84.010 because the petition was uncontested.
3. The Court's order restoring petitioner's firearm rights is not a "judgment," as contemplated by RCW 4.84.010.
4. The Court, in its discretion, does not award costs against the State. The Court finds that it would be unjust to apply RCW 4.84 against the State.
5. The Court adopts all reasoning and rationale contained in the State's response briefing.

CP at 35.

This matter comes before the Court on Appellant's appeal to reverse the trial court's order denying his motion for costs. CP at 32.

C. ARGUMENT

The Court should affirm the trial court's order denying costs. Appellant was not entitled to costs because petitions to restore firearm rights, in general, are not appropriately considered civil actions under RCW 4.84. Also, even if awards under RCW 4.84 might be appropriate in some instances of firearm rights restoration proceedings, RCW 4.84.010 was not triggered by the facts of this case. Finally, assuming RCW 4.84 is applicable to petitions to restore firearm rights, Appellant has not met his burden of demonstrating that the trial court abused its statutory discretion under RCW 4.84.190 in denying the motion for costs.

1. THE TRIAL COURT PROPERLY DETERMINED THAT THE COSTS PROVISIONS IN RCW 4.84 DID NOT APPLY TO APPELLANT'S PETITION

TO RESTORE HIS FIREARM RIGHTS
BROUGHT UNDER RCW 9.41.040.

The trial court properly denied Appellant's motion for costs under RCW 4.84 because (a) firearm rights restoration proceedings arise from the application of a criminal statute and (b) Appellant does not qualify as a prevailing party within the meaning of RCW 4.84.010.

- a. RCW 4.84 does not apply to Appellant's petition to restore firearm rights because such petitions are brought under a criminal statute intended to apply punishment to a petitioner's criminal conviction.

RCW 4.48 is not applicable to this proceeding because Appellant's petition for restoration was filed under a criminal statute. Courts considering RCW 4.48 have recognized that "RCW 4.84 entitled 'Costs' is under the general RCW Title 4, 'Civil Procedure,' and therefore, these statutes do not apply to criminal proceedings." *State v. Keeney*, 112 Wn. 2d 140, 145, 769 P.2d 295 (1989) (citing *State v. Sizemore*, 48 Wn. App. 835, 838, 741 P.2d 572 (1987)). The law from which this proceeding arises is set forth in RCW 9.41.040, in the chapter entitled "Firearms and Dangerous Weapons" under the general RCW Title 9, "Crimes and Punishments." This is the same criminal statute under which Petitioner's firearm rights were originally forfeited pursuant to his prior conviction.

Appellant is correct in pointing out that he has "filed a new civil filing to petition the court for his firearm rights." Appellant's Brief at 7-8.

However, the fact that Court protocol allowed Appellant to file his petition under a civil case number separate from the underlying conviction in this proceeding does not change the fact that his petition is brought under criminal law RCW 9.41.040(4). In fact, RCW 9.41.040(4)(b) requires that Appellant bring his petition before either "(i) the court of record that ordered the petitioner's prohibition on possession of a firearm; or (ii) the superior court of the county in which the petitioner resides." This specifically allowed Appellant to file with the same court that entered the underlying criminal judgment against him.

Prior to September 2, 2014, persons who filed restoration petitions were allowed to use their existing Pierce County Superior Court felony case numbers. CP at 21. At that time, a separate civil case number and filing fee was necessary only when one lacked an existing Pierce County criminal case number. *Id.* If the petition was assigned a civil case number, it would be heard on the civil motion calendar, but if the preexisting criminal case number was used, then the petition would be scheduled for a criminal motion date. *Id.* This demonstrates that the sorting of a petition under either a "civil" or "criminal" case number does not change the fact that the petition is brought under criminal law. The civil or criminal case number is merely a matter of organization within the Clerk's Office and the Court dockets. Accordingly, the civil case number assigned to Petitioner's restoration

petition is insufficient to characterize his petition as a civil proceeding within the meaning of RCW 4.48.

Instead, the review of this type of petition is best characterized as an extension of a criminal proceeding, as it arises out of criminal law RCW 9.41.040—the same statute whereby Appellant's firearm rights were initially forfeited subsequent to his prior conviction. As a proceeding under criminal law, RCW 4.84 does not apply to this petition, and the petitioner cannot recover costs. *Keeney*, 112 Wn. 2d at 145; *Sizemore*, 48 Wn. App. at 838; *State v. Obert*, 50 Wn. App. 139, 142, 747 P.2d 502 (1987). As stated by the trial court: "The restoration process stated in RCW 9.41.040 arises from the application of a criminal statute, and therefore the RCWs and court rules that award costs to prevailing party in civil cases do not apply." CP at 35.

Appellant's argument relying on RCW 9.01.120 is without merit. See Appellant's Brief at 8-9. The text of RCW 9.41.120 clearly iterates that the criminal proceedings under Title 9 *do not* affect a victim's civil remedies for the damages resulting from the crimes set forth in Title 9 unless specifically stated therein. First, Appellant's petition to restore his rights was not an action for damages or some other remedy resulting from the conduct prohibited by Title 9. Second, Appellant's goal in filing the petition—the repeal of a punishment for his crimes—is not the type of remedy that can

be brought in a civil proceeding. Likewise, Appellant's argument that a civilian cannot initiate criminal proceedings is without merit. *See* Appellant's Brief at 9. Proceedings under RCW 9A.04.040 are criminal in nature for the very reason that they arise out of an *already existing* criminal action. This is highlighted by the fact that, until recently, petitions were filed under the same criminal case number as the prior conviction.

Ultimately, a petition to restore firearm rights brought under a criminal statute is not within the scope of the Civil Rules which authorize the imposition of costs, and it was appropriate for the trial court to deny Appellant's motion.

- b. RCW 4.84 does not apply to the order restoring Appellant's firearm rights because Appellant was not a prevailing party within the meaning of RCW 4.84.010.

Appellant claims that he was entitled to costs pursuant to RCW 4.84.010(1), a statute applicable to civil proceedings, which provides: "The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed *to the prevailing party upon the judgment* certain sums for the prevailing party's expenses in the action, which allowances are termed costs." (Emphasis added.) For this statute to be triggered, there must be a "prevailing party upon the judgment" in a civil proceeding. Appellant does

not satisfy this description because (1) his petition was uncontested by the State, and (2) no judgment within the meaning of 4.84 was entered in his favor.

i. Appellant's petition to restore his firearm rights was uncontested.

Appellant cannot be deemed a "prevailing party" within the meaning of RCW 4.84 because his petition was entirely unopposed. His single, unsupported, conclusory sentence to the contrary is insufficient to show that he was a prevailing party. *See* Appellant's Brief at 10. For example, where a party's position is met with a voluntary nonsuit, courts refuse to award costs under RCW 4.84. *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn. 2d 389, 400, 325 P.3d 904 (2014) ("neither party is a prevailing party under RCW 4.84.250 after a plaintiff voluntarily dismisses the suit"); *Cork Insulation Sales Co., Inc. v. Torgeson*, 54 Wn. App. 702, 706, 775 P.2d 970 (1989) (Refusing to award costs under RCW 4.84.250 in a voluntary nonsuit). This is consistent with the long established principle that it is inequitable to impose costs on a defendant that does not resist a plaintiff's claim in any way. *Somerville v. Johnson*, 3 Wash. 140, 143, 28 P. 373 (1891) ("As the defendants have at no time appeared or resisted the plaintiff in any way, we think, under the circumstances, that it would be inequitable to impose any costs upon them."). Common sense indicates that an

unopposed party cannot be a prevailing party, (prevailing defined as "having superior force or influence," Webster's Ninth New Collegiate Dictionary (emphasis added)) as there would be no other party or position to prevail against.

Furthermore, refusing to impose costs on a party that in no way adds to another's expenses is in harmony with the idea that "[o]ne of the purposes of [RCW 4.84] is to encourage settlement of claims . . . to avoid the expense of trial." *Cork Insulation Sales Co., Inc. v. Torgeson*, 54 Wn. App. 702, 706, 775 P.2d 970 (1989) (citing *Harold Meyer Drug v. Hurd*, 23 Wn. App. 683, 687, 598 P.2d 404 (1979)). Here, the State has offered no opposition to the restoration of Appellant's firearm rights. In fact, the only involvement by any government entity in this proceeding has been by Pierce County to (1) aid Appellant and the Court in verifying the information provided in the petition, and (2) draft an order in favor of restoring Appellant's firearm rights. CP at 20. The County's actions in support of the actually *reduced* Appellant's costs of litigation. Having faced no opposition in his petition and absent any appearance by the State, Appellant cannot be deemed a prevailing party within the meaning of RCW 4.84, and equitable principles required that his motion be denied.

- ii. **No "judgment" within the meaning of RCW 4.84 was entered in Appellant's favor.**

Appellant cannot recover fees and costs because no judgment within the meaning of RCW 4.84 was entered in his favor. RCW 4.84.010, the statute upon which Appellant's argument wholly relies, is triggered when a party prevails "upon the judgment" rendered in a civil action. Although an order was entered by the Court restoring Appellant's rights, that order does not constitute a "judgment" within the meaning of RCW 4.84.

The Court's evaluation of petitions under RCW 9.41.040 is an entirely ministerial function of the Court. *State v. Swanson*, 116 Wn. App. 67, 78, 65 P.3d 343 (2003) ("RCW 9.41.040(4) imposes only a ministerial duty on the court when the enumerated, threshold requirements are met."). Such tasks are characterized as ministerial because "the law prescribes and defines an official's duty with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Swanson*, 116 Wn. App. at 78 (citing *City of Bothell v. Gutschmidt*, 78 Wn. App. 654, 662, 898 P.2d 864 (1995)). *See also State v. City of Seattle*, 137 Wn. 455, 461, 242 P. 966 (1926) ("*The distinction between merely ministerial and judicial and other official acts is that where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial.*").

The Court did not exercise any judgment or discretion in restoring Petitioner's firearm rights. It was not resolving a case or controversy

because there was no opposition to the petition. Instead, the Court was merely performing a ministerial review and approving a petition where "the enumerated, threshold requirements are met" under RCW 9.41.040(4). *See Swanson*, 116 Wn. App. at 78. Accordingly, although the order entered by the trial court benefited Petitioner by restoring his rights, it was not be deemed a "judgment" within the meaning of RCW 4.84.010.

2. EVEN IF RCW 4.84 DID APPLY TO PROCEEDINGS TO RESTORE FIREARM RIGHTS, THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO DENY COSTS TO APPELLANT PURSUANT TO RCW 4.84.190.

The trial court's decision to deny Appellant's motion for costs should be upheld because (a) Appellant has waived the issue in his brief and (b) RCW 4.84.190 grants the trial court discretion in this matter, and (c) Appellant has not satisfied his burden in showing that the trial court abused its discretion.

- a. Appellant has waived this issue by failing to argue it in his brief.

The Appellant included an assignment of error which states "The trial court erred in Conclusion of Law #4 by applying RCW 4.84.190 instead of RCW 4.84.010." Appellant's Brief at 4. The appellant failed to argue this issue in his brief, despite designating it as an assignment of error. Assignments of error that are not supported by argument or authority are

waived. *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 96, 231 P.3d 1211 (2010) (citing *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004) (citing *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986))).

b. RCW 4.84.190 is the applicable statute.

The trial court denied Appellant's motion for costs pursuant to its discretion under RCW 4.84.190, which provides:

"In all actions and proceedings other than those mentioned in this chapter [including RCW 4.48.100], where no provision is made for the recovery of costs, they may be allowed or not, and if allowed may be apportioned between the parties, in the discretion of the court."

Appellant fails to identify any section in RCW 4.84 that mentions the type of proceeding at issue here. Instead, the statute Appellant has relied upon in support of his position, RCW 4.84.010, simply defines what "costs" are to be allowed to prevailing parties in civil actions. *See* RCW 4.84.010 (entitled "Costs allowed to prevailing party - Defined - Compensation of attorneys"). Therefore, if RCW 4.84 does apply to petitions to restore firearm rights, such proceedings fall under the ambit of RCW 4.84.190—giving the trial court broad discretion to allow, refuse, or apportion costs as is just.

c. Appellant has failed to show that the trial court abused its discretion by denying costs.

"Where the decision or order of the trial court is a matter of

discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). Under RCW 4.84.190, the trial court properly refused to allow costs because it would be unjust to penalize the State and reward Appellant when (1) the State did not oppose the petition to restore Appellant's firearm rights, (2) the County prepared the order in favor of restoring the rights, and (3) Appellant caused the initial forfeiture of his firearm rights by engaging in a "serious crime”.

As stated above, this case falls squarely within the equitable reasoning of the Court in *Somerville*, which stated: "As the defendants have at no time appeared or resisted the plaintiff in any way, we think, under the circumstances, that it would be inequitable to impose any costs upon them." 3 Wash. at 143. The State has not resisted the restoration of Appellant's rights in any way; in fact, the County prepared the order to restore Appellant's rights. CP at 5, 20. Moreover, as in *Somerville*, the State itself has not appeared in this action—only the County has appeared in order to assist Appellant and the Court in providing the criminal history check and provide a recommendation on whether the requirements for restoration have been satisfied.

Ultimately, this proceeding was brought before a court only because

Appellant committed a crime that resulted in the forfeiture of his firearm rights. To award costs in this proceeding would penalize the State and reward Appellant for a crime he committed that was so serious as to warrant the statutory forfeiture of his civil rights. The Court should therefore deny Appellant's motion.

D. CONCLUSION.

The Court should uphold the trial court's ruling that Appellant was not entitled to costs or fees under RCW 4.84. Appellant brought his petition to restore firearm rights pursuant to RCW 9.41.040—the very same criminal statute under which they were initially forfeited. RCW 4.84 does not apply to criminal proceedings. Moreover, Appellant cannot be a prevailing party within the meaning of RCW 4.84 when (1) his petition was uncontested (and even supported by the County), (2) issuing firearm rights restoration orders is merely a ministerial function of the Court, and (3) the State itself never even appeared in the matter. Moreover, even if the provisions of RCW 4.84 did apply to proceedings to restore firearm rights, it would be unjust for the Court to award fees to Appellant in this case and such costs should be denied pursuant to RCW 4.84.190. The trial court did not abuse its discretion in denying costs to the Appellant.

For these reasons, the Court should affirm the trial court's denial of costs.

DATED: April 14, 2016.

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A handwritten signature in black ink, appearing to read "Cort O'Connor", written over a horizontal line.

CORT O'CONNOR
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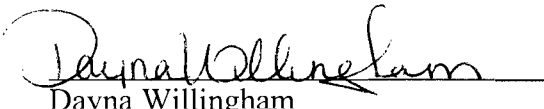
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On April 14, 2016, I certify that I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system and hereby certify that on April 14, 2016, a copy of the foregoing was forwarded by United States Mail, postage prepaid, to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Tacoma, Washington, this 14 day of April, 2016.


Dayna Willingham
Legal Assistant
Pierce County Prosecutor's Office

PIERCE COUNTY PROSECUTOR

April 14, 2016 - 10:16 AM

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